No. 329

In the Supreme Court of the United States

OCTOBER TERM, 1947

ANNE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the circuit court of appeals (R. 218–223) is reported at 162 F. 2d 562.

JURISDICTION

The judgment of the circuit court of appeals was entered June 20, 1947 (R. 223), and a petition for rehearing was denied August 15, 1947 (R. 224). The petition for a writ of certiorari was filed September 5, 1947, and on October 27, 1947, this Court granted the petition, "limited to ques-

tions 1 and 2 presented by the petition for the writ" (R. 226). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also, Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTION PRESENTED

Whether there was probable cause for the arrest of petitioner for possessing opium prepared for smoking and the search of her room in a hotel incident thereto for the contraband opium, where experienced narcotic agents unmistakably detected and traced the pungent, identifiable odor of burning opium emanating from her room and knew, before they arrested her, that she was the only person in the room.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment to the Constitution provides—

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Narcotic Drugs Import and Export Act of February 9, 1909, c. 100, 35 Stat. 614, as amended by the Acts of January 17, 1914, c. 9, 38 Stat. 275, May 26, 1922, c. 202, 42 Stat. 596, June 7,

1924, c. 352, 43 Stat. 657, and June 14, 1930, c. 488, 46 Stat. 585, provides in part as follows:

> SEC. 2. [42 Stat. 596] * * *
>
> (b) [21 U. S. C. 173] That it is unlawful to import or bring any narcotic drug[1] into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. * * *
>
> (c) [21 U. S. C. 174] That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years.

[1] Defined in Section 1 as meaning "opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine."

(d) [21 U. S. C. 173] Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; * * *

* * * * * *

(f) [21 U. S. C. 174] Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury.

SEC. 3. [38 Stat. 275, 276; 21 U. S. C. 181] That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine,[1a] and the burden of proof shall be on the claimant or the accused to rebut such presumption.

[1a] The first Act of February 9, 1909, 35 Stat. 614, made it unlawful to import opium in any form or any preparation or derivative thereof after April 1, 1909, with the proviso that opium and preparations or derivatives, other than opium prepared for smoking, were permitted to be imported for medicinal purposes under regulations prescribed by the Secretary of the Treasury. Under the amendment of May 26, 1922, § 2 (b), *supra*, 42 Stat. 596, only crude opium and coca leaves may now be lawfully imported.

SEC. 5. [42 Stat. 596, 597; 21 U. S. C. 180] That no smoking opium or opium prepared for smoking shall be admitted into the United States or into any territory under its control or jurisdiction for transportation to another country, or be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or for any other purpose; and except with the approval of the Commisioner of Narcotics, no other narcotic drug may be so admitted, transferred, or transshipped.

Section 2553 (a) of the Internal Revenue Code (26 U. S. C. 2553 (a)) provides—

It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a)[2] except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

[2] "Opium, coca leaves, any compound, salt, derivative, or preparation thereof."

STATEMENT

Petitioner was indicted in the United States District Court for the Western District of Washington in four counts charging the unlawful purchase and concealment of narcotics (R. 2–3). Count 1 (R. 2) charged that on or about April 8, 1946, petitioner purchased 85 grains of opium prepared for smoking, which was not then in or from the original stamped package, in violation of Section 2553 (a) of the Internal Revenue Code (26 U. S. C. 2553 (a)); the second count (R. 2) charged that on the same date petitioner received and concealed 85 grains of opium, knowing that it had been unlawfully imported into the United States, in violation of Section 2 (c) of the Narcotic Drugs Import and Export Act (21 U. S. C. 174); the third and fourth counts (R. 3) related to 41 grains of yen shee, partially smoked opium, and charged similar violations of the statutes in respect of that narcotic. Upon conviction, she was sentenced to imprisonment for eighteen months and to pay a fine of $250 on the first count and to imprisonment for one day and to pay a fine of $1 on each of the third and fourth counts, the latter sentences of imprisonment to run concurrently with the sentence on the first count. Imposition of sentence was suspended on the second count and petitioner was placed on probation for five years, commencing on the date sentence was imposed. (R. 23–26.) The judgment was affirmed on appeal (R. 223).

The sole issue before the Court relates to the lawfulness of the arrest of petitioner and, as an incident to the arrest, the search of her room and seizure of opium and devices for smoking it. Prior to trial, on June 26, 1946, petitioner moved to suppress all evidence seized from her room on April 8, 1946, on the ground that the search and seizure were unlawful (R. 4–6). Affidavits in support (R. 6–9, 16–19) and in opposition (R. 10–16) to the motion were filed, and on July 20, 1946, the Court entered an order denying the motion (R. 19–20; see also, R. 109–110). At the trial, petitioner unsuccessfully renewed the motion when the seized items were offered in evidence (see R. 41), and again at the close of the Government's case (R. 106–107, 109–110) and at the close of all the evidence (R. 165). The evidence adduced at the trial on the issue of probable cause for her arrest, may be summarized as follows:[3]

Petitioner owns and operates the Europe Hotel in Seattle, Washington (see R. 116–117). There are thirty rooms and twelve apartments in the hotel, and, at the time of the trial, there were approximately thirty-five tenants (R. 116). Room 1 in the hotel is a small room, no larger than 9′ x 12′ (R. 115, 54), which is near the head of the stairway leading from the street entrance to the hotel (R. 116, 146).[4] This room was used by peti-

[3] See, *infra*, pp. 37–38.

[4] Apparently, the hotel itself was reached by means of a stairway from the street level.

tioner as a business office and as her sleeping room (R. 116, 149). The door to the room had three glass panels, each about eight inches wide, which had a silver coating on them (R. 146–147, 150–151). Petitioner was able to see through the panels from inside the room (R. 124), but a person on the outside could not see into the room, except that "a little bit in one corner you can see through it" (R. 151; cf. R. 124).

Detective Belland, who was in charge of the narcotic squad of the Seattle police department (R. 36), testified that about 7:30 p. m. on April 8, 1946, one Odekirk, a user of narcotics (R. 67), informed him "that there were unknown persons smoking opium in the Europe Hotel at that time" (R. 38, 58–59). Odekirk told Belland that "he came up there and the place was reeking with opium smoke; that someone was smoking up there at that time" (R. 57). Pursuant to Belland's directions, Odekirk returned to the Europe Hotel "for the purpose of interviewing the management of that hotel to find out if they would tell him, or who in that hotel was a user of opium or might be smoking opium" (R. 58, 60). Belland testified that "I saw him [Odekirk] enter the hotel. He couldn't any more than have got up to the head of the stairs when he came right down again" (R. 58, 60). Belland also testified that Odekirk knew that someone was smoking opium, "because he could smell it right in the hallway," but he did not know who was doing so or in

what room (R. 59–60, 69). These events took about 15 minutes (R. 69–70), and Belland then immediately contacted the federal narcotic agents and gave them the information he had received (R. 59, 70). The agents were in the process of making an arrest, but shortly thereafter Belland and four narcotic agents (R. 37, 102) proceeded to the Europe Hotel (R. 37, 70), arriving there between 8:30 and 9:00 o'clock (R. 72).

Belland, who had 12 years' experience with narcotics (R. 61, 36), and narcotic agent Giordano, who had 3 years' experience in this field (R. 91), entered the hotel, while the others remained outside. Belland testified (R. 38)—

> We went in there for the purpose of interviewing the manager of that hotel to ascertain what information she might give us on anyone that would be using narcotics in there at that time. As we came up the stairs there was a strong odor of opium smell. It led us right to Room Number 1, the room of the defendant. As I stood in front of the door there was a strong odor coming out between the sill and the door.

Agent Giordano testified (R. 92) similarly that—

> As we started up the stairs I got a distinct odor of smoking opium. As I proceeded up the stairway the odor became more apparent. As I hit the top of the stairs I just followed the odor to the left; and right at Room 1, where the odor was emanating from the doorway. It was very strong right there at the door of Room 1.

Belland asked Giordano to summon the other agents before they proceeded any further. Giordano told the waiting agents "that they had detected a very pronounced odor of smoking opium upstairs" (R. 96). Agent Moodie remained outside and agents Graben and Goode entered the hotel with Giordano (R. 96–97). Graben, who had been employed in the Bureau of Narcotics for 21 years (R. 14), testified that by "the time we had reached the top of the stairway, I recognized the odor of smoking opium." The odor at the door of Room 1 was "very pronounced"; "a very strong odor of smoking opium" (R. 97). Goode, who had been a narcotic agent for 22 years (R. 79; see R. 10), similarly testified that "When I first got upstairs, I could smell smoking opium very strong"; "when I got up close to this door, there was a very strong odor of opium coming out of this room" (R. 80).

Giordano took a position near the fire escape (R. 97), leaving Belland, Goode and Graben in front of the door to Room 1. Belland rapped on the door and identified himself and, after some delay during which "some shuffling or noise in the room" was heard, petitioner opened the door and admitted them (R. 38–39, 93; see also R. 11, 13, 15). Belland stated in his affidavit on the pre-trial motion that when the door was opened, "the odor of smoking opium was very strong" (R. 13). The affidavits of Graben and Goode were to the same effect (R. 11, 15). Bel-

land testified that he told petitioner, "I want to talk to you about this opium smell in the room here" (R. 39). Petitioner denied the existence of the smell, and Belland then informed her that she was under arrest and that they were going to search the room (R. 39, 81, 97).

The agents then proceeded to search the room (R. 39). While this was taking place, petitioner's mother and Kay Doran, who resided in different rooms of the hotel, entered the room (R. 120, 101). Petitioner immediately summoned Belland to the hallway and, according to Belland's testimony (R. 39), stated, "if you will get my mother out of here and back to her room I will come up with the opium." At this juncture agent Graben discovered concealed beneath the bedcovers, which had been "thrown back towards the wall," a one-ounce ointment jar containing 85 grains (R. 104) of opium prepared for smoking with no marks or labels, and a makeshift opium pipe. They also found, under the covers a quantity (R. 105) of yen shee (partially smoked opium—see R. 46–47) lying loose on a Chinese brass tray, a metal lamp base, a metal funnel, and two yen hocks (needles used for dipping into an opium jar—R. 40). (R. 98, 39–46, 81–82.) An additional small quantity of yen shee was found in a suitcase which was in the room (R. 52–53, 81, 85).

The duration of the search until the discovery of the opium and the other items, was estimated

by government witnesses as "five minutes to eight minutes" (R. 55), "about six or seven minutes" (R. 84), and "ten or fifteen minutes" (R. 101). Petitioner testified that the search lasted "a good forty-five minutes" (R. 120; see also R. 149). In this respect, there was proof that the opium pipe was still very warm when it was found (R. 44, 82, 100), and that it takes from 10 to 15 minutes for such a pipe to cool (R. 82).

Petitioner testified that she was resting in her bed when the agents first knocked on her door about 8:45 p. m., and that she understood somebody to say it was "Mayor Devin" at the door (R. 120). Her first reaction was that whoever it was at the door was concerned with the opium and equipment (R. 120), which she claimed to be holding for a former tenant of the hotel (R. 117–118). She immediately hid the opium and equipment in the bed, and, after dressing, she opened the door (R. 120). According to her testimony, she asked Belland what he wanted and he said, "Oh, you will find out" (R. 130). In respect of her conversation in the hallway with Belland, petitioner testified that she explained that her mother and another resident who had come into the room "don't know anything about it" and that just as Belland said petitioner's mother could leave the room, the opium was discovered in the bed (R. 121). Petitioner denied Belland's testimony that she promised to surrender the opium if they would take her mother from the room, but

she admitted that she promised that "I will talk to you" if they would permit her mother and Doran, the other resident who came into the room, to leave (R. 130–131). Notwithstanding her testimony that she hid the opium immediately after Belland knocked on her door (R. 120, 128–129), petitioner denied that she knew what the agents were searching for (R. 131).

SUMMARY OF ARGUMENT

The agents knew that petitioner was the only person in the hotel room and they had detected the strong, unmistakable odor of smoking opium emanating from the room. This constituted, we submit, probable cause for believing that petitioner possessed opium prepared for smoking, and the agents, therefore, were justified in arresting her (*Carroll* v. *United States*, 267 U. S. 132, 156–157) and in searching for and seizing the contraband opium as an incident to the arrest. *Harris* v. *United States*, 331 U. S. 145.

In *Taylor* v. *United States*, 286 U. S. 1, 6, this Court recognized the reliability of "a distinctive odor as a physical fact indicative of possible crime." The majority of the lower federal courts, in appropriate circumstances, have similarly recognized that arresting officers reasonably may conclude on the basis of what they smell that a crime is being committed. *Pong Ying* v. *United States*, 66 F. 2d 67 (C. C. A. 3) illustrates the application of the doctrine in an opium case. A

few courts, notably the Second Circuit, have conceded that the sense of smell may be relied upon but these courts require that there also must be other corroborating evidence. See *United States* v. *Kronenberg,* 134 F. 2d 483 (C. C. A. 2). This doctrine is too rigid; it supplants a rule of reason with a legal formula—smell plus other corroborative evidence—and fails to give sufficient regard in each case to the nature of the odor involved and the certainty with which it can be identified.

There is no dispute here that opium, when smoked, has an unmistakable odor which is easily identified by anyone who is familiar with it. Detective Belland described the odor as "rather a sweet, sickening smell" which cannot be confused with any other odor (R. 78). The impartial authorities from which we have quoted in the Argument (*infra,* pp. 22–24) confirm Belland's testimony. That odor was identified in this case by five different persons who were familiar with it. It was traced by the arresting officers to petitioner's small combination office and sleeping room in the hotel, and when petitioner admitted the officers the fumes of smoking opium were heavy within the room. In these circumstances, the agents would have been less than reasonable if they had not concluded that petitioner—the only person in the room—possessed opium for smoking. To require here that the agents should have sought other corroborating information

would be to require that they should have corroborated the obvious.

ARGUMENT

THE CIRCUMSTANCES THAT PETITIONER WAS THE ONLY PERSON IN HER ROOM AND THAT PERSONS WHO WERE EXPERIENCED WITH NARCOTICS DETECTED THE PUNGENT FUMES OF SMOKING OPIUM EMANATING FROM PETITIONER'S ROOM AMPLY JUSTIFIED THE ARRESTING OFFICERS IN BELIEVING THAT SHE POSSESSED SMOKING OPIUM

Under Sections 2 and 3 of the Narcotic Drugs Import and Export Act, *supra,* pp. 3–5, the mere possession of smoking opium constitutes probable cause for charging the possessor with the felony of having unlawfully imported such opium or of having received or concealed it, knowing that it was unlawfully imported. He may be indicted solely on the basis of his possession of the opium, and he may be convicted, unless the possession is explained to the satisfaction of the jury. In these circumstances, it is clear that a reasonable basis for believing that petitioner possessed smoking opium constituted probable cause for her arrest. See *United States* v. *Sam Chin,* 24 F. Supp. 14, 17–19 (D. Md.). And, in fact, she was arrested for this offense. The question here is whether the arresting agents were justified in believing that petitioner possessed smoking opium.

At the very outset, it must be noted that petitioner's position in this Court is inconsistent. On the one hand, great emphasis is placed on the fact that,

with the sensory knowledge they had, the agents did not obtain a search warrant or a warrant of arrest (see Br. 10, 17–18), and, on the other, it is urged (Br. 14–16) that the agent's only knowledge that an offense was being committed derived from their sense of smell and that this was not probable cause for believing that petitioner was committing an offense. If there was not probable cause in the circumstances of this case for believing that petitioner was guilty of felony, as petitioner urges, there was no basis for securing a warrant. If there was probable cause, it is settled law that the agents were entitled to make the arrest without more (*Carroll* v. *United States*, 267 U. S. 132, 156–157),[5] and to make a reasonable search for the contraband as an incident to the arrest. *Harris* v. *United States*, 331

[5] The situation here is not one in which officers effect an arrest without a warrant even though they may have an adequate opportunity to secure one. As we have shown in the Statement, they went to the Europe Hotel to make an investigation and, at the initial stage of their activities, they became aware of facts which convinced them that one or more persons in room 1 were illegally in possession of opium prepared for smoking. In a sense, the arrest was made in "hot pursuit." It is no answer to suggest that one of the agents could have been sent for a warrant while the others stood guard. For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might have been an opium smoking den. If any person in the room sought to leave, the agents would have been faced with the choice of permitting a suspect to flee or of arresting him. The first alternative certainly is not acceptable. The justification for the second equally justifies the arrest when it was made.

U. S. 145.* In short, the issue here is whether in the circumstances the agents reasonably could rely on the information conveyed to them by their sense of smell and conclude that petitioner was, or recently had been, smoking opium, and thus that she possessed illicit narcotics.

The factual picture is not an unusual one. On the basis of information from an informer that some unidentified person was smoking opium in the

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*In the State of Washington a police officer needs no warrant to make an arrest if he has reasonable grounds to believe that the person arrested has committed a felony. See *State* v. *Robbins*, 25 Wash. 2d 110, 169 P. 2d 246; *State* v. *Krantz*, 24 Wash. 2d 350, 164 P. 2d 453; *State* v. *Lindsey*, 192 Wash. 356, 73 P. 2d 738, certiorari denied, 303 U. S. 654. Washington, too, adheres to the doctrine that as an incident to a lawful arrest, the defendant's premises may be searched for instrumentalities of the crime. See *State* v. *Evans*, 145 Wash. 4, 258 Pac. 845; *State* v. *Thomas*, 183 Wash. 643, 49 P. 2d 28.

The problem raised in *United States* v. *Di Re*, No. 61, this Term, whether the arresting officers apprised the defendant of their authority and the cause for the arrest, is not present here. The evidence shows that when Belland knocked on petitioner's door he identified himself as "Detective Lieutenant Belland" (R. 38, 80, 93, 97); that when the door was opened, he informed petitioner that "I want to talk to you about this opium smell in the room here" (R. 39); and that petitioner knew she had been arrested for an offense involving the possession of opium because she offered to "come up with the opium" if Belland would get her mother out of the room (R. 39). Petitioner's testimony that she did not know what the agents were searching her room for (R. 131) is also belied by her own testimony (R. 120) that when Belland knocked on her door the "first thing that naturally struck me" was to conceal the opium and the equipment for smoking it.

hotel, the agents undertook an investigation. And, as is not unreasonable, their first contemplated source of inquiry was the manager of the hotel. For if anyone was smoking opium in the hotel, the manager most likely would know who it was, or, at the very least, would be anxious to assist the agents in learning who it was. Detective Belland and agent Giordano, both experienced in the narcotics field, went into the hotel and proceeded to the very first room reached upon entering—petitioner's combination office and sleeping room at the head of the entrance stairway. They perceived the odor of burning opium in the hotel, and the closer they came to their first place of inquiry the stronger the odor became. The odor was strongest immediately in front of the door to petitioner's room, and the agents confirmed their then strong suspicions by sniffing at the crack between the door and the sill and ascertaining that the odor which they had detected was emanating from that room. Two additional agents, also experienced with narcotics, were summoned and when they entered the hotel they, too, underwent the same experience as Belland and Giordano. At this juncture, four agents and an opium user all had reached the same conclusion—that someone was smoking opium in the hotel—and, to paraphrase Belland's testimony, by "following their noses" the agents concluded that whoever was doing so was in Room 1. It was only then that they knocked on the door and identified

themselves. When the door was opened by petitioner, the odor of smoking opium became more intense. Petitioner admitted the agents; she was alone in the room. They announced the purpose of their visit, and they immediately placed her under arrest. Incident thereto, they searched the room for the contrabrand opium, which they easily found, at the same time that petitioner was agreeing with detective Belland that she would "come up with the opium" if her mother were permitted to leave the room.

We agree with petitioner (Br. 11) that "the determinative question here is whether or not the arrest was legal." And we need not dispute petitioner's contention (Br. 11–13) that the information conveyed by the informer that someone in the hotel was smoking opium was not of itself probable cause justifying the arrest. In our view, the only significance of the informer in this case lies in the fact that he, also a user of narcotics, easily detected the odor of smoking opium in the hotel. We firmly disagree, however, with petitioner's basic contention that the agent's knowledge perceived through their sense of smell could not in this case afford a foundation for reasonably concluding that petitioner possessed smoking opium. It is our position that, like the sense of sight, the sense of smell may in some circumstances convey to the mind convincing knowledge that a prohibited act is taking place. We shall show that burning opium gives off a strong, un-

mistakably identifiable odor; that witnesses for the Government and a witness for petitioner agreed that a person familiar with the odor can identify it without difficulty; that in this case, five persons experienced with narcotics quickly recognized the odor and that it was traced to its source—petitioner's room; and that when the agents were admitted into the room and found only petitioner present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotic.

The general legal principles as to what constitutes probable cause are not in dispute. The accepted definitions of probable cause are those adopted with approval from state cases by this Court in *Stacey* v. *Emery*, 97 U. S. 642, 645:

> * * * A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.
>
> * * * Such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty. * * *

Or, as this Court, again quoting a state case, said in *Carroll* v. *United States*, 267 U. S. 132, 161, "The substance of all the definitions is a reasonable ground for belief in guilt."

This Court has emphasized that actual guilt need not be established to show probable cause; that it is sufficient if the officer acts as a reasonably prudent man:

> * * * To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. [*Husty* v. *United States*, 282 U. S. 694, 700–701.]
>
> In determining what is probable cause, we are not called upon to determine whether the offense charged has in fact been committed. [*Dumbra* v. *United States*, 268 U. S. 435, 441.]

The test of the validity of an arrest, in other words, is reasonable deduction, not proof beyond a reasonable doubt. The controversy arises from the application of these principles, and it is to that question that we now turn.

A. SMOKING OPIUM HAS A DISTINCTIVE AND UNMISTAKABLY IDENTIFIABLE ODOR

Detective Belland described the smell of smoking opium (R. 78) as follows:

> It is rather a sweet, sickening smell or odor. Once you have smelled it you don't confuse it with any other smell. You just recognize it when you smell it again.[a]

Petitioner's witness, Hutchinson, who was experienced with opium, testified similarly that he might not be able to ascertain by sight whether a person had been smoking opium, but that "I could tell the smell of opium" (R. 157). In

[a] "The taste of the half-fluid extract [smoking opium] is sweetish and oily, somewhat like rich cream, but the smell of the burning drug is rather sickening." 2 Williams, *The Middle Kingdom* (1848), p. 390.

United States v. *Sam Chin*, 24 F. Supp. 14, 16 (D. Md.), the court took testimony on the question whether burning opium has a recognizable odor; the opinion states: "The testimony is convincing and uncontradicted that burning opium has a smell that is peculiar and unique to itself and once perceived cannot be forgotten."

Such testimony is confirmed by recourse to the usual sources of impartial information. The *Encyclopedia Brittanica* (Vol. 16, 14th Ed., p. 811) describes smoking opium as a "black treacly substance, having the fragrant opium-like odour which is characteristic." Opium "has a peculiar, heavy, narcotic, disagreeable smell." *Homeopathic Pharmacopoeia of the United States* (Sixth Ed. 1941) p. 434. The *British Pharmacopoeia* (1932) p. 316, describes the odor as "strong and characteristic," and the *United States Pharmacopoeia* (XIII Ed.) p. 359, describes it as "odor characteristic, narcotic." The smell of opium "is peculiar, and perfectly *sui generis;* it is not unpleasant, and in recently well-prepared opium is somewhat fruity." 2 *Encyclopedia of Chemistry* (1880) p. 486. War Department Field Manual 19–20, p. 192, describes opium in its raw state as "a dark brown, sticky gum with an acrid, bitter, nauseous taste and heavy, characteristic odor." *Opium Smoking*, by H. H. Kane, M. D. (1882), p. 31, states:

> The process of seething the crude opium is exceedingly unpleasant to those unaccustomed to it, from the overpowering nar-

> cotic fumes which arise; *and this odor marks every shop where it is prepared, and every person who smokes it.*[1]

Similarly, Terry and Pellens in *The Opium Problem* (1928), state (p. 74):

> The equipment required, *the odor of the burning drug* and later its cost all combined to make relatively easy the closing of the places where the drug was used in this form, once public opinion and police activities were awakened.

That burning opium has a characteristic, unmistakably identifiable odor is further confirmed by the Report of the Committee Appointed by the Philippine Commission to Investigate the Use of Opium and the Traffic Therein, Sen. Doc. No. 265, 59th Cong., 1st sess. The Committee made a study of the use and control of opium in Japan, Formosa, the Philippine Islands, and other areas in which the opium problem existed. In discussing the situation in Japan, the committee reported that the opium law there was "prohibitive and effective," and stated (p. 22):

> At first the committee was inclined to be somewhat skeptical of the efficiency of the law so far as it touches the Chinese, especially as these are settled chiefly in the coast towns, where their well-known ingenuity in smuggling and the ease with which the commodity can be conveyed secretly into the country

[1] All italics have been added.

> affords facilities for evasion. But apparently the vigilance of the police is such that even when opium is successfully smuggled in it cannot be smoked without detection. *The pungent fumes of cooked opium are unmistakable and betray the user almost inevitably.*

We reiterate that five different persons who were familiar with the odor of burning opium entered the Europe Hotel and were convinced beyond any doubt that someone in the hotel was smoking opium.[8] Odekirk, the informer, told Belland that he had been in the hotel and that "the place was reeking with opium smoke" (R. 57). Under Belland's direction, he entered the hotel a second time and reassured himself through his sense of smell that someone was smoking opium at that time (R. 69). Belland, the city detective who had been in narcotics work for 12 years, noticed the "strong odor of opium smell"

[8] Petitioner was asked on direct examination: "Did you smell anything peculiar about your room that evening when the officers came?" She answered, "No, I wouldn't, because I had been painting for so long that I didn't know." (R. 123.) Petitioner also testified that shortly after the agents entered the room, Kay Dolan, a resident at the hotel, came to the room and that one of the agents asked her, "Can't you smell anything?" and that she replied, "Well, I don't know. I am smoking a cigarette" (R. 120). Petitioner's mother denied that she had ever smelled smoking opium around the hotel (R. 147) and that she smelled anything unusual in petitioner's room on the night of the arrest (R. 148; see also, R. 149). Another witness for petitioner who did not live at the hotel testified generally that whenever he was in the hotel he never noticed the smell of opium (R. 158).

as he ascended the entrance stairway toward Room 1, the combination office-sleeping room; "there was a strong odor coming out between the sill and the door" of Room 1 (R. 38; see also R. 74). In Belland's words (R. 73), "Our nose just led us right up to the crack of that door." Agents Giordano (R. 92), Graben (R. 96–97), and Goode (R. 80) all testified that their experiences on entering the hotel were the same.* And when petitioner opened the door and admitted the officers, they saw that she was alone in the room.

The case is thus one where law enforcement officers skilled in tracking down illicit opium and other narcotics were convinced in their own minds that the crime of possessing smoking opium was being committed by petitioner in Room 1 of the hotel. The question is simply whether it was reasonable for them to predicate their judgment on the existence of the pungent odor readily identified by five persons as the unmistakable odor of burning opium which the officers easily traced to the room found to be occupied by petitioner alone. The reasonableness of their conclusion is illustrated, we think, by the every-day experience of every-day people (and this includes law enforcement officers) in predicating action, in appropriate situations, solely on what they perceive through their sense of smell.

* The fourth agent, Moodie, had been stationed outside (R. 97) and was not a witness at the trial.

Liquefied petroleum gases for heating and cooking purposes strikingly illustrate a situation in which society recognizes the sense of smell as a reliable source of knowledge. Thus, some states have required that such gases be odorized by the addition of a malodorant agent perceptible to a person with an average olfactory sense.[10] Gas is not perceptible through the sense of sight, nor is it something which a person can feel with his hands. Yet no one would seriously urge that if a person smells gas emanating from his neighbor's home he should not immediately enter the house, and attempt to save the lives of whoever might be there. Indeed, if the agents in this case had detected the odor of gas emanating from petitioner's room, instead of the odor of burning opium, they would have been remiss in their responsibility to society, both as law enforcement officers and as human beings, if they had not entered the room for the purpose of saving her from the ill effects of the gas. The situation is no different because the agents were attracted to the room for law enforcement purposes. Once the distinctiveness of the odors is recognized, as it must be, there is no room for differentiating the two situations so far as they involve probable cause for the action taken.

During the recent war a "Commando Sniff Kit" was developed by the military forces for

[10] See Beinfang, *The Subtle Sense* (1946), pp. 79-84.

the purpose of training specialized troops in olfactory scouting.[11] Similarly, officials of the Office of Civilian Defense early recognized the importance of the sense of smell in detecting enemy gas attacks. Local air raid wardens received training in identifying the various gases known to chemical warfare, which consisted in part of periodically smelling the various gases until they were able to identify each by its odor. See *Protection Against Gas*, United States Government Printing Office (1941), pp. 33–36. The training which the air raid wardens received is no different than that which narcotic agents undergo in the day to day performance of their duties.

There are manifold situations in which persons with a normal sense of smell are able to detect an identifiable odor and to distinguish it from all others. Thus, for example, it may be doubted that anyone who has experienced the smell of burning rubber would have any difficulty in again recognizing the odor. The odor of alcohol on the breath is a common basis for ascertaining whether a person has been drinking intoxicating beverages. The perfume industry seemingly is founded on the proposition that the conduct of man is influenced by what he smells.

The courts long have recognized that activities which are objectionable because of their im-

[11] See Beinfang, *supra*, at pp. 88–89.

pact upon the olfactory sense may furnish a basis for legal redress. The law of nuisance is filled with cases in which damages have been allowed or injunctions granted because particular odors have been found to be offensive to persons who are subjected to them. See for example, *United States* v. *Luce*, 141 Fed. 385 (C. C. D. Del.), where the nauseating odor of decaying fish from a fish fertilizer factory was recognized to be an actionable wrong. See also, *Fertilizing Company* v. *Hyde Park*, 97 U. S. 659 (stench from offal transported from slaughterhouse to defendant's fertilizer plant); *De Blois* v. *Bowers*, 44 F. 2d 621 (D. Mass.) (fumes and odors from steel galvanizing plant); *City of Temple* v. *Mitchell*, 180 S. W. 2d 959 (Tex. Civ. App.) (odor and flies from sewage plant); *Lead* v. *Inch*, 116 Minn. 467, 134 N. W. 218 (odor from stable); *Mitchell* v. *Hines*, 305 Mich. 296, 9 N. W. 2d 547 (offensive odor from feeding garbage to pigs); *Keene* v. *City of Huntington*, 79 W. Va. 713, 92 S. E. 119 (smoke and offensive odor from incinerator plant). And see 1 Moore, *A Treatise on Facts* (1908) 364–369, for a collection of other cases in which the sense of smell was a determinative factor.

Our argument does not mean that the sense of smell always affords a reliable basis for action. Many odors are not strong enough or distinctive enough to be relied upon as a basis for action

without corroboration by some of the other senses. See, *infra,* pp. 33–34. But inthis respect the sense of smell is in no different status than the other senses. While the sense of sight is a reliable basis for action, there are circumstances in which it might be inadequate—as, for example, in the black of night. The sense of hearing can distinguish between many sounds, but we know that it does not receive certain high pitch sounds. Like smell, the sense of taste—which is many thousand times less acute than the sense of smell[12]—likewise is a reliable guide only where the taste is distinctive. With respect to all the senses, their reliability as a basis for reasonable action must be judged in each case on a consideration of all the surrounding circumstances. Thus, in judging action based on the sense of smell, it is important to consider the distinctiveness of the odor involved, the physical conditions in which it existed, and the opportunity which there was to subject the olfactory organ to the odor.

In this case, there is no dispute that burning opium gives off a pungent odor which can readily be identified by a person familiar with it. The odor here originated in a small room and there is no evidence that the window was open or that other circumstances existed which would have diffused the odor, and thus have made it less recognizable. And finally, there is the fact that skilled

[12] Best and Taylor, *Physiological Basis of Medical Practice* (4th ed. 1945) 1054.

officers who were thoroughly familiar with the odor unanimously and beyond any doubt identified and traced it to a room occupied only by petitioner.

B. IN APPROPRIATE CIRCUMSTANCES THE SENSE OF SMELL ALONE MAY BE RELIED UPON AS EVIDENCE THAT A CRIME IS BEING COMMITTED, AND THE WEIGHT OF JUDICIAL AUTHORITY SO HOLDS

We do not rely upon practical considerations alone to support our position in this Court. Beginning with *McBride* v. *United States*, 284 Fed. 416, decided by the Fifth Circuit twenty-five years ago, a substantial body of authority has developed which accepts the doctrine that in appropriate circumstances the sense of smell may be relied upon as evidence that a crime is being committed.[13] In the narcotics field, the decision of the Third Circuit in *Pong Ying* v. *United States*, 66 F. 2d 67, illustrates the application of the doctrine. The facts there were substantially similar to the facts here and in upholding the arrest and incidental search and seizure the court stated (66 F. 2d at 67–68):

> Now here we have not a mere suspicion that a violation of law had been committed or was likely to be committed, but one of

[13] In the *McBride* case prohibition agents acting on the basis of their detection of the fumes of whiskey in the process of manufacture searched a stable and arrested persons who were operating a still found in the stable. For the purpose of obtaining a decisive ruling on the question, the Government consented to the granting of the defendant's petition for a writ of certiorari in this Court, but certiorari was denied, 261 U. S. 614.

the then actual commission of an unlawful act. There was some one within the room. Unburning opium in a room would, of course, cause no fumes, but burning opium would. So the fact of escaping opium fumes was evidence to the officers that opium was being used and burned in that apartment. * * *

With these facts before the narcotic officers, we think they would have been derelict in their duty had they not acted promptly and effectively to enter and search the apartment. What constitutional rights were violated in their so doing? The defendant, whose counsel claims constitutional protection for him, was within and in control of apartment No. 5. Some one within those premises created the fumes of the unlawful drug which unerringly brought the officers following the fumes face to face with the entrance thereto. The proof of guilty conduct within the apartment was evidenced outside the door. To throw a shield of constitutional protection over a lawbreaker who has himself created the evidence on the outside of his premises that the law is being violated within such premises is to make the constitutional provision not a means of protecting against unwarranted entrance, but a barrier to lawful entrance by a vigilant officer where the evidence of lawbreaking comes from the premises thus sought to be shielded from all efforts to enforce the law. The

> claim of constitutional privilege in this case has not a trace of legality in it.

Similarly, in *United States* v. *Borkowski*, 268 Fed. 408 (S. D. Ohio), an arrest without a warrant was justified where prohibition agents detected the odor of raisins cooking. In the words of the court (268 Fed. at 412):

> If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue laws was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight.

Other courts have similarly stated the rule. See, e. g., *United States* v. *Sam Chin*, 24 F. Supp. 14 (D. Md.); *Wida* v. *United States*, 52 F. 2d 424, 425 (C. C. A. 8); *Catagrone* v. *United States*, 63 F. 2d 931, 932 (C. C. A. 8); *Benton* v. *United States*, 28 F. 2d 695, 696 (C. C. A. 4); *De Pater* v. *United States*, 34 F. 2d 275, 276 (C. C. A. 4);

Lee Kwong Nom v. *United States*, 20 F. 2d 470 (C. C. A. 2);[14] *United States* v. *White*, 29 F. 2d 294 (D. Neb.); *United States* v. *Rellie*, 39 F. Supp. 21 (E. D. N. Y.); *United States* v. *Seiler*, 40 F. Supp. 895 (D. Md.); *United States* v. *Fischer*, 38 F. 2d 830 (M. D. Pa.).

Another line of cases, which seems to have had its growth as a result of the Court's decision in *Taylor* v. *United States*, 286 U. S. 1, does not deny that the sense of smell may be relied upon, but insists that it must be corroborated by other information before it constitutes probable cause for believing that an offense is being committed. See, e. g., *United States* v. *Kronenberg*, 134 F. 2d 483 (C. C. A. 2); *United States* v. *Kaplan*, 89 F. 2d 869 (C. C. A. 2); *Cheng Wai* v. *United States*, 125 F. 2d 915 (C. C. A. 2); *United States* v. *Lee*, 83 F. 2d 195 (C. C. A. 2); *United States* v. *Schultz*, 3 F. Supp. 273 (D. Ariz.); *United States* v. *Tom Yu*, 1 F. Supp. 357 (D. Ariz.).[15]

Our sole disagreement with the doctrine enunciated by the latter cases is that it is too rigid. It supplants the rule of reasonableness with a legal

[14] Compare later decisions of the Second Circuit cited in the following paragraph.

[15] We do not include cases such as *United States* v. *Kind*, 87 F. 2d 315 (C. C. A. 2), where "the offense consisted of possession of unstamped alcohol, and the presence of alcohol on the premises, even if smell were enough to detect it, did not prove the case." *United States* v. *Kaplan*, 89 F. 2d 869, 870 (C. C. A. 2). See *United States* v. *Seiler*, 40 F. Supp. 895 (D. Md.); cf. *Grau* v. *United States*, 287 U. S. 124.

formula—smell plus other corroborative evidence—and fails to give sufficient regard in each case to the nature of the odor involved and the certainty with which it can be identified. Compare *De Pater* v. *United States*, 34 F. 2d 275, 276 (C. C. A. 4). Thus, for example, the Second Circuit in *United States* v. *Lee*, 83 F. 2d 195, *supra*, doubted whether the odor of opium which was in the bedroom could be smelled at the outer door of an apartment. In such circumstances, it may well be that there is no sufficient basis for believing that an offense is being committed. The situation in this case is quite different. The agents smelled the odor of burning opium immediately outside the door of petitioner's room—and the door was an ill-fitting one which permitted the odor to seep out (R. 75). Five persons, all thoroughly familiar with the odor of burning opium, were convinced beyond any doubt that the odor which they detected was that of smoking opium. Quite plainly, there would not have been an odor of smoking opium unless someone in the room was or recently had been smoking the narcotic. That person was identified as soon as petitioner opened the door to her room. In such circumstances, to insist that the agents must seek additional corroboration is to require that they should corroborate the obvious. It substitutes for the test of reasonableness a rule of thumb which may be satisfactory in many cases, but which certainly does not lead to a sensible result in a case such as the pres-

ent one, where the information which the agents had convincingly demonstrated that petitioner possessed opium for smoking.

As we have said, the decision of this Court in *Taylor* v. *United States,* 286 U. S. 1, seems in large measure to have led some of the lower courts to adopt the formula of smell-plus-something-else. By quoting a single sentence from the opinion, 286 U. S., at 6—"Prohibition officers may rely upon a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search"—these courts have claimed justification for the doctrine which they have adopted. Analysis of the *Taylor* decision, we believe, demonstrates their misconception. See *Pong Ying* v. *United States,* 66 F. 2d 67, 68 (C. C. A. 3); *United States* v. *Sam Chin,* 24 F. Supp. 14, 20 (D. Md.).

In the *Taylor* case prohibition agents detected the odor of whiskey coming from within a garage. Through a small opening they saw many cardboard cases which they thought probably contained jars of liquor. No one was in the garage and the agents had no basis for believing otherwise. With no purpose of making an arrest and solely with a view to searching the garage, the agents broke into it and commenced to search it. In the course of the search the defendant came upon the scene and was arrested. 286 U. S. at 5. The Government, in effect, confessed error in this

Court, and the Court held that the search without a warrant was unreasonable. The opinion emphasized that the case, unlike the present one, was not one in which there was a search and seizure incident to an arrest. Instead, the issue in the case was whether it was reasonable in the circumstances to make the search without first obtaining a search warrant. It was because the agents had abundant opportunity to first secure a warrant that the Court held the search to be unreasonable. We find nothing in the opinion to support the assumption of the Second Circuit that the holding of unreasonableness was based upon the fact that the prohibition agents acted on the basis of what they smelled. In the present case there was, of course, no necessity for obtaining a search warrant if there was probable cause for the arrest of petitioner. A search for the contraband (see *supra*, p. 15) incident to the arrest was reasonable. *Harris* v. *United States*, 331 U. S. 145.

In the *Taylor* case, the Court plainly recognized the reliability of "a distinctive odor as a physical fact indicative of possible crime." 286 U. S. at 6. The words which follow—"but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search"—mean to us that even though there may have been probable cause for believing that illicit whiskey was in the garage, the agents should have relied upon it to obtain a search warrant instead of breaking into the garage. Indeed, implicit in

the opinion is the assumption that, based on what they knew from their sense of smell, the agents had probable cause for obtaining such a warrant. In this aspect of the case, the present case draws considerable support from the *Taylor* decision. Certainly, there is nothing in the opinion which requires the conclusion that no matter how convincing an identifiable odor is, it is never an adequate basis for believing that a crime is being committed unless it is corroborated by some other fact independently perceived through another sense.

In sum, we submit that the court below correctly held (R. 220–221) that petitioner's arrest was justified. The agents had information that someone was smoking opium in the hotel; the telltale odor of burning opium led them unerringly to petitioner's room; the odor was strong within the room; only petitioner was in the room when the door was opened; no one had left the room, all exits having been under observation. In these circumstances, the officers had reasonable grounds to believe that petitioner was committing the felony of possessing opium and thus had probable cause to arrest her.

Throughout her brief petitioner has woven two contentions which require but brief comment. She suggests (Br. 5, 18, 20) that the agents' testimony at the trial improved the facts recited in their affidavits in opposition to the motion to suppress, the im-

plication being that they may have testified falsely. A careful examination of the affidavits in the light of the testimony at the trial is convincing that there is no basis in fact for petitioner's assertion. As would be expected, the testimony at the trial is much more detailed, much of the detail having been developed by petitioner's counsel in cross-examining the agents (see, e. g., R. 47–78). It is because the testimony at the trial furnishes a clearer factual picture of what occurred that we have relied primarily upon it in the Statement and Argument. In every essential respect the facts as related in the affidavits and at the trial are the same.

The other suggestion by petitioner (Br. 6–7, 17–18) rests on two fragments of testimony at the trial. Detective Belland testified (R. 66) that he had been working with the narcotic agents in investigating a "large shipment of opium which was brought into this territory," and in describing the events when the agents first entered petitioner's room, Belland testified (R. 39) that he said to petitioner, "I want you to consider yourself under arrest because we are going to search the room." On the basis of this testimony petitioner argues that this is a case in which law-enforcement officers entered her room ostensibly for the purpose of making an arrest but in reality for the purpose of making a search for opium without a warrant. See *Harris* v. *United States*, 331 U. S. at 153. The fact that the agents were investigating a large

shipment of opium demonstrates nothing more than that they had reason to suspect an increase in the use of opium in that area and that they probably were alert to follow every lead which might disclose the persons who had obtained the contraband. It does not mean or even create a permissible inference that the agents were purposely searching for opium without warrants or probable cause. Similarly, Belland's statement to petitioner is not entitled to the sinister connotation which she now ascribes to it. The testimony of the other agents at the trial (R. 81, 97) demonstrates that Belland's description of what he said to petitioner when she was arrested was merely his manner of expressing, somewhat inartfully and without thought of the possible legal implications which might be drawn from his language, that what actually happened was that she was told that she was under arrest and the agents then commenced a search for the opium which, of course, was contraband. The search followed a lawful arrest, it was not long in duration, and it was directed to the discovery of the opium. There was no search for mere evidence of crime.

It is plainly shown by the evidence that when the agents entered the Europe Hotel they did so to investigate the smell of smoking opium of which they had been apprised, and they proceeded to the manager's room to seek assistance from her. When it became apparent to them that the opium

was being smoked in her room they had no alternative but to arrest her and to search for the opium which, it was reasonable to assume, was in the room. To suggest that this was a sham arrest as a guise for making an unlawful search is to disregard the facts which convincingly demonstrate exactly the opposite.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the circuit court of appeals is correct and that it should therefore be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 329.—October Term, 1947.

Anne Johnson, Petitioner, v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 2, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Petitioner was convicted on four counts charging violation of federal narcotic laws.[1] The only question which brings the case here is whether it was lawful, without a warrant of any kind, to arrest petitioner and to search her living quarters.

Taking the Government's version of disputed events, decision would rest on these facts:

At about 7:30 p. m. Detective Lieutenant Belland, an officer of the Seattle police force narcotic detail, received information from a confidential informer, who was also a known narcotic user, that unknown persons were smoking opium in the Europe Hotel. The informer was taken back to the hotel to interview the manager, but he returned at once saying he could smell burning opium in the hallway. Belland communicated with federal narcotic agents and between 8:30 and 9 o'clock went back to the hotel with four such agents. All were experienced in narcotic work and recognized at once a strong odor of burning opium which to them was distinctive and unmistakable. The odor led to Room 1. The officers did not know who was occupying that room. They knocked and

[1] Two counts charged violation of § 2553 (a) of the Internal Revenue Code (26 U. S. C. 2553 (a)) and two counts charged violation of the Narcotic Drugs Import and Export Act as amended (21 U. S. C. 174).

a voice inside asked who was there. "Lieutenant Belland," was the reply. There was a slight delay, some "shuffling or noise" in the room and then the defendant opened the door. The officer said, "I want to talk to you a little bit." She then, as he describes it, "stepped back acquiescently and admitted us." He said, "I want to talk to you about the opium smell in the room here." She denied that there was such a smell. Then he said, "I want you to consider yourself under arrest because we are going to search the room." The search turned up incriminating opium and smoking apparatus, the latter being warm, apparently from recent use. This evidence the District Court refused to suppress before trial and admitted over defendant's objection at the trial. Conviction resulted and the Circuit Court of Appeals affirmed.[2]

The defendant challenged the search of her home as a violation of the rights secured to her, in common with others, by the Fourth Amendment to the Constitution. The Government defends the search as legally justifiable, more particularly as incident to what it urges was a lawful arrest of the person.

I.

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a

[2] 162 F. 2d 562.

constitutional right. Cf. *Amos* v. *United States*, 255 U. S. 313.

At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. We cannot sustain defendant's contention, erroneously made, on the strength of *Taylor* v. *United States*, 286 U. S. 1, that odors cannot be evidence sufficient to constitute probable grounds for any search. That decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character.

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[3] Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment

[3] In *United States* v. *Lefkowitz*, 285 U. S. 452, 464, this Court said: ". . . the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime . . . ."

to a nullity and leave the people's homes secure only in the discretion of police officers.[4] Crime, even in the privacy of one's own quarters, is, of course, of grave concern to society, and the law allows such crime to be reached on proper showing. The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear. But they were not capable at any time of being reduced to possession for presentation to court. The evidence of their existence before the search was adequate and the testimony of the officers to

[4] "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." *Agnello* v. *United States*, 269 U. S. 20, 33.

that effect would not perish from the delay of getting a warrant.

If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required.

II.

The Government contends, however, that this search without warrant must be held valid because incident to an arrest. This alleged ground of validity requires examination of the facts to determine whether the arrest itself was lawful. Since it was without warrant, it could be valid only if for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty.[5]

The Government, in effect, concedes that the arresting officer did not have probable cause to arrest petitioner until he had entered her room and found her to be the sole occupant.[6] It points out specifically, referring to the time just before entry, "For at that time the agents did not know whether there was one or several persons in the room. It was reasonable to believe that the room might

[5] This is the Washington law. *State* v. *Symes*, 20 Wash. 484; *State* v. *Lindsey*, 192 Wash. 356; *State* v. *Krantz*, 24 Wash. 2d 350; *State* v. *Robbins*, 25 Wash. 2d 110. State law determines the validity of arrests without warrant. *United States* v. *Di Re*, — U. S. —, decided January 5, 1948.

[6] The Government brief states that the question presented is "whether there was probable cause for the arrest of petitioner for possessing opium prepared for smoking and the search of her room in a hotel incident thereto for contraband opium, where experienced narcotic agents unmistakably detected and traced the pungent, identifiable odor of burning opium emanating from her room and knew, before they arrested her, that she was the only person in the room."

have been an opium smoking den." And it says, ". . . . that when the agents were admitted to the room and found only the petitioner present they had a reasonable basis for believing that she had been smoking opium and thus illicitly possessed the narcotic." Thus the Government quite properly stakes the right to arrest, not on the informer's tip and the smell the officers recognized before entry, but on the knowledge that she was alone in the room, gained only after, and wholly by reason of, their entry of her home. It was therefore their observations inside of her quarters, after they had obtained admission under color of their police authority, on which they made the arrest.[7]

Thus the Government is obliged to justify the arrest by the search and at the same time to justify the search by the arrest. This will not do. An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine "the right of the people to be secure in their persons, houses, papers and effects," [8] and would obliterate

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[7] The Government also suggests that "In a sense, the arrest was made in 'hot pursuit'. . . ." However, we find no element of "hot pursuit" in the arrest of one who was not in flight, was completely surrounded by agents before she knew of their presence, who claims without denial that she was in bed at the time, and who made no attempt to escape. Nor would these facts seem to meet the requirements of the "Washington Uniform Law on Fresh Pursuit." Session Laws 1943, ch. 261.

[8] In *Gouled* v. *United States*, 255 U. S. 302, 303, this Court said: "It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd* v. *United States*, 116 U. S. 616, in *Weeks* v. *United States*, 232 U. S. 383, and in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two (Fourth and Fifth) Amendments. The effect of

one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE REED and MR. JUSTICE BURTON dissent.

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the decisions cited is: that such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty and private property'; that they are to be regarded as of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen,—the right, to trial by jury, to the writ of *habeas corpus* and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."